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IMPLEMENTATION AND MODIFICATION OF TITLE IX STANDARDS: THE EVOLUTION OF ATHLETICS POLICY

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I. INTRODUCTION

The protracted litigation in *Cohen v. Brown University,*[1] in which a series of federal courts construed the requirements of Title IX of the Educational Amendments of 1972[2] in the context of athletic programming, culminated in a major victory for women athletes and, conversely has given colleges and universities greater reason to reflect upon their efforts to secure an NCAA championship. In *Cohen,* the U.S. Court of Appeals for the First Circuit described equal opportunity for men and women to participate as the "core of Title IX's purpose" and applied a three-part test to ascertain the university's progress towards that goal.[3] The case concluded with the court's condemnation of Brown's efforts (though the University was years ahead of its peers in providing opportunities for female student-athletes) and the Supreme Court's refusal to hear Brown's the University's appeal. Currently therefore, colleges and universities are faced with the judicial endorsement of Title IX policy which arguably requires institutions to take the steps

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* Mr. Hunt received his J.D. and his Ph.D. in Higher Education Administration from the University of Utah. This paper is an extract of his doctoral dissertation entitled Implementation and the Expansion of the Mandate: A History and Critical Legal Analysis of Twenty-five Years of Title IX Athletic Policy Development (1997) (unpublished Ph.D. dissertation, University of Utah) (on file with author).

1. The litigation generated four independent rulings: Cohen v. Brown Univ. *(Cohen I),* 809 F. Supp. 978 (D.R.I. 1992), *aff'd (Cohen II)* 991 F.2d 888 (1st Cir. 1993), *aff'd on remand, (Cohen III)* 879 F. Supp. 185 (D.R.I. 1995), *aff'd (Cohen IV)* 101 F.3d. 155 (1st Cir. 1996) and *cert. denied* 117 S. Ct 1469 (1997).

2. Title IX provides that: "[n]o person in the United States shall, on the basis of sex, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." 20 U.S.C. §§ 1681–1688.

3. *Cohen II,* 991 F.2d at 897.

necessary to provide athletic opportunities to men and women on a proportionately equal basis.

This depiction is premised on the observation that the three-part analysis applied in *Cohen*, or the "effective accommodation" analysis,[4] can only be satisfied by achieving the statistical relationship between participation and enrollment known as "substantial proportionality" which *Cohen* and other courts have acknowledged as a "safe harbor" from legal challenge.[5] In application, this means that to avoid the imposition of a presumption of noncompliance, institutions are obliged to extend greater opportunities to women via preferential program expansion—notwithstanding conflicts with the underlying statute and equal protection doctrine.[6] It is on this basis that the requirements have been characterized in some corners as "an affirmative action, quota-based scheme."[7]

Title IX and its legislative history[8] explicitly discourage the use of preferences. Section 1681(b) of the statute, in particular, provides that:

> Nothing contained in . . . this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity in comparison with the total number or percentage of persons of that sex in any community, state, section or other area.[9]

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4. The analysis, first outlined by the Department of Education's Office for Civil Rights (OCR) in its 1979 "Policy Interpretation" allows institutions to demonstrate compliance in one of three ways: 1) substantial proportionality between the ratio of men and women in the athletics program and the ratio of male to female undergraduates; 2) by demonstrating a history and continuing practice of program expansion for the underrepresented sex; or 3) by demonstrating that the existing program "fully and effectively" accommodates the interests and abilities of the underrepresented sex. *See* 44 Fed. Reg. 71,413 (1979).

5. *See id.*

6. *See* William E. Thro & Brian A. Snow, *The Conflict Between the Equal Protection Clause and* Cohen v. Brown University, 123 EDUC. L. REP. 1013, 1016 (1998) (arguing that the great victory for women in *Cohen* was achieved by sacrificing the constitutional value that no one should be treated differently on the basis of gender).

7. *Cohen IV*, 101 F.3d 155 (1st Cir. 1996) (Torruella, J., dissenting).

8. *Hearings before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. and Labor*, 94th Cong. (1975).

9. 20 U.S.C. §1681(b) (1998).

By affirming the use of preferences to address statistical disparities in athletic participation that may reflect genuine differences in athletic interests rather than discrimination, in short, *Cohen* can be viewed as an endorsement of a much broader view of Title IX than the statute, or its history may warrant.

The foregoing characterization of *Cohen,* of course, involves many complex issues which are not only difficult to summarize, but challenge traditional distinctions between matters of law and public policy. From a public policy perspective, moreover, *Cohen* is in many respects a reasonable extension of Title IX's underlying purpose of ending sex discrimination in education and an appropriate (and perhaps overdue) response to the defiance of colleges and universities toward the regulation. Legally speaking, on the other hand, the decision can be interpreted as greater than the sum of Title IX's legislatively authorized parts.

The objective of this Article is to examine *Cohen* as an evolution of Title IX standards with the hope of better understanding both the Title IX experience and the effect of that unique, post-legislative process known as "implementation" on the development of law and policy. Part II of this Article sets forth the conceptual framework which will guide this examination. Part III recounts the legal and political climate leading up to the adoption of Title IX. Part IV describes the modification of standards over the 25 years since the statute's enactment. Part V discusses the prevailing views of the current regulatory framework. Finally, Part VI concludes that colleges and universities face a much more invasive type of regulation than anticipated at the time of the statute's creation.

II. CONCEPTUAL FRAMEWORK

The conceptual framework chosen for this Article focuses on the delicate process of implementing governmental mandates like Title IX, which essentially use the legal system to advance substantive social objectives. It is attentive, in particular, to the pressures brought to bear on the legal system when confronted with politically charged social initiatives and when asked to resolve disputes involving significant issues of public policy.

As a topic of social-scientific research, implementation has received considerable attention of late. Beginning with Press-

man and Wildavsky's seminal study,[10] social scientists have examined a host of variables theorized to influence implementation outcomes including resource, organizational, and political requirements.

From these studies some agreement has arisen that the process simply involves too many variables to persist in the belief that lawmakers can unilaterally create policies which address all the relevant social, organizational, and political needs.[11] "The day is long gone," as Yudof observed, "when lawyers and social scientists [could] assume that Court decisions and legislative and administrative rules automatically are translated into the desired action."[12]

While explanations of this breakdown between command and compliance abound, comparatively little has been said about the role of law and the legal system in the implementation equation. An exception is William Clune, who in the early 1980s recognized implementation as a process of creating or attempting social change through law and widely ruminated on the consequences of the use of law for "social engineering."[13] In a system traditionally characterized by the rigorous observation of predetermined legal standards, Clune is interested in what occurs when that conventional legal "rationality" collides with politically-charged social reform like Title IX.

Clune discusses two related effects at length. The first is the inability of conventional legal rationality to adequately comprehend or resolve what are essentially public policy conflicts. The second involves the infusion of public policy discourse into the interpretation and enforcement of rights that which, unlike

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10. JEFFERY PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND, (1st ed., 1973).

11. *See* MALCOLM GOGGIN, IMPLEMENTATION THEORY AND PRACTICE: TOWARD A THIRD GENERATION (1990).

12. Mark Yudof, *Implementation Theories and Desegregation Realities*, 2 ALA. L. REV. 441, 443 (1981). He adds: "[t]he conflict between discretion and compliance with policies embodied in rules has been long recognized in the law. There are many similarities between jurisprudence and implementation theory as each seeks to unravel the complex relationship between coercive policies and rules and relatively autonomous decision making." *Id.* at 446.

13. William H. Clune, III, *A Political Model of Implementation and Implications of the Model for Public Policy, Research, and the Changing Roles of Law and Lawyers*, 69 IOWA L. REV. 47, 51 (1983).

those in the private sector, "depend dramatically on the state rather than freedom from the state."[14]

The legal system, Clune avers, is primarily responsible for the maintenance of the modern regulatory-welfare-state, an area in which issues of law and public policy are often inextricable. This responsibility, he argues, has precipitated a shift from the rigid "rule-orientation" of conventional legal rationality to a "reflexive rationality" which is more responsive to social and political input.[15] For the sake of social progress, in other words, Courts and bureaucrats, are more readily engaged in activities ordinarily regarded as the exclusive domain of the legislative bodies, such as evaluating competing social interests and the effects of policy.[16]

This "politicization" of public law, Clune argues, stems from the shortcomings of the political process itself. To negotiate that process, for instance, lawmakers must often resort to statutory language which evades difficult, embedded issues. Compounding this imprecision is the fact that whatever knowledge is available to legislators about the social problem they wish to address is typically deficient. The result is the generation of "socio-legal" mandates that are momentarily satisfactory to a group of politicians, yet fail to adequately comprehend either the problem or the effects of policy on the problem.

Moreover, because common implementation chores like the interpretation, application, and enforcement of these directives provide a multitude of opportunities for interested parties to alter the enacted "political balance" (or the way in which competing demands were originally compromised by legislators), efforts will inevitably be mounted to either restrict or expand the law's sphere of influence. Arguments that some aspect of the program imposes an unreasonable hardship or fails to adequately advance the goals of the statute, for example, may materialize in the form of a lawsuit seeking to annul regulations and guidelines.

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14. *Id.* at 102-03.

15. *See id.*; *see also* Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239 (1983).

16. *See* Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239 (1983); *see also* Harold A. McDougall, *Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83 (1989).

Because such activities tend to elicit similar actions from those with conflicting interests and ideologies. Clune describes implementation as an "interactive" process in which "[a]ny given legal or political action may be met with a reaction by the organizations affected."[17]

> Thus, a bill or a judicial decree introduced to enforce civil rights may be met with legislative initiatives designed to dilute or reinforce it. Regulations enacted under legislation may be met with political resistance and the regulations may be revoked. Enforcement measures such as threatened sanctions may be greeted with political backlash designed to produce a withdrawal of the threat, or with various organizational adaptations. . . . In a lawsuit, these efforts take the form of attempts to modify the decree or to obtain various remedial orders. In administrative practice, lobbying to strengthen or to weaken the underlying statute, administrative regulations, and practical administrative sanctions are common.[18]

Within a process bearing a resemblance to a military campaign, in other words, competing demands are constantly reasserted in the hope that objectives and standards will be modified. "When policy does grow in an orderly fashion," Clune asserts, "it is because struggles were resolved at a multitude of critical junctures in a manner at least reasonably consistent with the underlying purpose of the law."[19]

At the heart of Clune's "political model of implementation," therefore, is the proposition that political struggles over policy goals do not necessarily expire with the legislative process, but are exported to the implementation process where discretion is considerably decentralized and can be set in motion by interested parties on either side of the issues. This accessibility, he asserts, operates as a virtual assurance that organizations will confront one another in "legalized sectors of public policy," and that the progression from a statutory directive to the legal detail of a functioning, regulatory framework will rarely be logical or tranquil.[20] Struggle, conflict, and compromise among contending interest groups, in short, will ensure that policy goals

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17. Clune, *supra* note 13, at 56.
18. *Id.* at 56-57.
19. *Id.* at 57-58.
20. *See id.* at 99.

and their associated costs are continuously revisited, accompanied by the potential that the political balance of the program may be revised.

Clune's assertions about the nature of implementation and public law, to summarize, stand in marked contrast to more conventional theories holding that implementation is (or should be) merely a ministerial process in which political determinations of policy are faithfully carried out,[21] as well as legal theory holding that the law and the legal system are (or should be) insulated from social and political influence.[22] While acknowledging that these conventional suppositions have some validity, Clune believes that the real and perceived effect of substantive social reforms on a host of interests makes implementation an inescapably political undertaking.

In addition to supplying a conceptual framework for understanding implementation, Clune provides a great deal of practical guidance for those interested in examining the modification of legal objectives in implementation. Because the mandate is viewed as an "overture to a complex process of compromise and adjustment," in particular, he believes that an understanding of that political compromise, is the basis for comprehending later modifications, which are held to "proceed from the same source."[23] The balance of this Article focuses on the history and structure of Title IX, information which, is in turn, is used to examine several significant adjustments in the program's gen-

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21. *See* Daniel A. Mazmanian & Paul A. Sabatier, *The Conditions of Effective Implementation: A Guide to Accomplishing Policy Objectives*, 5 POL'Y ANALYSIS 481 (1979); GEORGE C. EDWARDS III, IMPLEMENTING PUBLIC POLICY (1980).

22. *See* Isaac D. Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 L. & SOC'Y REV. 571 (1977). The distinction between traditional legal rationality and the "modern-public" rationality to which Clune ascribes lies in differing conceptions of the appropriate relationship of legal norms to society, and the conceptual apparatus used to sustain that relationship. Under traditional views, law is held to be authoritative because its norms, or moral and technical determinations, are insulated from social and political manipulation through the observation "rational formalities," including the strict application of posited legal rules and principles.

This "autonomy" from politics, however, is criticized as the sources of the law's inability to respond to the evolution of social values. Relying on a body of legal professionals who employ "peculiarly legal reasoning to resolve specific conflicts," according to Clune and others, inhibits the flexibility and learning necessary to successfully administer socio-legal programs. Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239 (1983).

23. Clune, *supra* note 13, at 59, 83.

eral objectives as well as those which have occurred in the much narrower context of the regulation of intercollegiate athletics.

III. TITLE IX FORMATION

The overarching aim of the women's groups, which, in the early 1970s coalesced into the "second women's movement," was to exploit the "full range of political tactics" to combat the use of gender classifications in laws and policies governing many aspects of social and economic life.[24] Lawsuits, for example, were initiated to pressure the federal courts to elevate the level of scrutiny applied to gender classification under equal protection analysis,[25] and a major political campaign was mounted to secure approval of the Equal Rights Amendment (ERA)[26]—a constitutional measure designed to prohibit the use of gender classifications in all but the most compelling circumstances. The legislative effort from which Title IX emerged, in other words, was but one aspect of a three-part strategy to produce a basis in the law for a "single, coherent theory of women's equality," and the sole component of that strategy which sought to take capitalize on the recent successes of the civil rights movement.[27]

As a contemporary and harmonious political objective, therefore, the ERA provides perhaps the clearest expression of the goals which prompted Representative Edith Green to introduce an amendment in 1970 to Title VI of the Civil Rights Act (1964) designed to prohibit sex discrimination in all federally

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24. *See* ALBIE SACHS, & JOAN HOFF WILSON, A STUDY OF MALE BELIEFS AND LEGAL BIAS IN BRITAIN AND THE UNITED STATE (1978); *see also* W. Douglas Costain, & Anne N. Costain, *The Political Strategies of Social Movements: A Comparison of the Women's and Environmental Movements*, 19 CONG. & THE PRESIDENCY 1 (1992).

25. At the time, laws and policies differentiating between men and women, or "gender classifications" were sustained under equal protection analysis if they bore a reasonable relationship to some legitimate governmental objective. By contrast, laws and policies creating racial classifications had to be narrowly tailored to affect some compelling government interest.

26. The Equal Rights Amendment provided that: "equality of right under the law shall not be denied or abridged by the United States or by any state on account of sex." H.R.J. Res. 208, 92d Cong. (1971); S.J. Res. 8, 92d Cong. (1971).

27. Barbara A. Brown, *The Equal Rights Amendment: A Constitutional Basis for the Equal Rights of Women*, 80 YALE L.J. 871 (1971).

assisted programs. Like the ERA, the proposed Title VI amendment was opposed on the basis that it would engender an undesirable level of equality between the sexes because in many aspects of social and economic life sex, it was widely regarded as a *bona fide* basis for differential treatment.[28] Green responded in 1971 by introducing an independent provision limited to prohibiting sex discrimination in federally assisted *educational* programs and activities, with express exemptions for single-sex, military, and religious institutions.[29]

In slightly altered form, this provision proved to be the sole success of the three-part strategy to effect change in federal law by members of the women's movement. But this success only distantly reflected the goal exhibited in the ERA of eradicating sex discrimination on the broadest possible scale. On one level, therefore, the movement's inability to emulate that policy (as well as the judiciary's continued resistance to elevating equal protection standards and the ultimate failure of ERA) can be understood as the result of an unwillingness on the part of lawmakers to treat sex discrimination like race discrimination.

Nowhere was this unwillingness more apparent than in the effort to further qualify Title IX protection by exempting college and university admissions policies from the operation of the proposed legislation. In that instance, Republican lawmakers in the House of Representatives asserted that the imposition of federal control over admissions would "plant the seed of destruction for our system of higher education as we know it."[30]

> Enactment of Title [IX] would . . . significantly weaken one of the great strengths of the American system of higher education–diversity. Diversity in the types of educational institutions affords more freedom to students, allowing each the opportunity to select the type of educational environment best suited to their individual needs, and encourages colleges to experiment and develop innovative programs. *The imposition of a monolithic unity by federal statute would serve only to*

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28. Minority groups already covered by Title VI were wary that banning sex discrimination under Title VI would create a political backlash threatening the source of their own protection. *See Hearings before the Special Subcomm. on Educ. of the Comm. on Educ. and Labor,* 91st Cong., vols. 1 & 2 (1970) ("1970 House Hearing Report").

29. *See id.*

30. 117 CONG. REC. 39,249 (1971).

> *homogenize campuses*, a condition repugnant to the very nature of higher education in this country and contrary to the best interests of the future generations of college students.[31]

Although the proposed legislation sought only to eliminate the consideration of an applicant's sex rather than require institutions to equalize numbers of male and female students, the rhetoric was enlarged to illustrate the potential erosion of institutional autonomy and academic freedom:

> Mr. Chairman, I offer this amendment to preserve the swiftly eroding rights of colleges and universities of America. We must view Title [IX] for what it plainly is, just one more giant step toward involvement by the Federal Government in the internal affairs of institutions of higher education. The constant danger is that all too often federal involvement in the internal affairs of institutions is but the first step toward ultimate Federal control.[32]

Without the prompting of a change in constitutional law elevating gender to the same level of protection as race (e.g. ratification of the ERA), Title IX opponents may have reasoned, there was little reason to abandon the longstanding tradition of deference to college and university discretion or to marginalize the academic freedoms acknowledged by the Supreme Court in *Sweezy v. New Hampshire* to include the "ability of the institution to determine for itself, on academic grounds . . . *who may be admitted*."[33]

To such assertions, Title IX proponents responded that federal intervention in higher education for the purpose of preventing discrimination was not an issue of first impression; Congress had enacted Title VI of the Civil Rights Act nearly a decade earlier to prohibit colleges and universities from discriminating on the basis of race or nationality.[34] Ultimately, however, many lawmakers apparently felt that sex discrimination was neither as serious nor pernicious as race discrimination, and adopted the amendment limiting Title IX's application to admissions.[35]

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31. *Id.* (remarks of Rep. Erlenborn) (emphasis added).
32. 117 CONG. REC. 39,248 (1971).
33. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (emphasis added).
34. *See* 117 CONG. REC. 39,252 (1971).
35. The 1972 House-Senate Conference Committee substituted a provision from

IV. MODIFICATION OF STANDARDS

A. *The Definition of Title IX Coverage*

The transition from Title IX's sparse language to a set of comprehensive regulations dealing with a variety of educational programs and activities involved a great deal of interpretation, a task which Congress expressly delegated to the Department of Health, Education and Welfare (DHEW). The agency's draft regulations[36] reveal that in the absence of more explicit statutory direction and a shortage of case law dealing with sex discrimination in education, DHEW chose to give the statute a very broad interpretation, substantially expanding its coverage and the agency's own powers of enforcement.

In a move that astonished many observers, for example, DHEW abrogated perhaps the most significant of Title IX's limitations extending coverage from programs "receiving federal financial assistance" to those which, by institutional proximity, were presumed to benefit indirectly from that assistance, and by defining "assistance" to include funds paid indirectly to institutions by student recipients of federal financial aid.[37] In this manner, the agency extended coverage to virtually every aspect of both public and private institutions, transforming Title IX jurisdiction from a narrow "program-specific" standard into a much broader "institutional" standard of coverage.[38]

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the Senate version of Title IX which, instead of exempting all admissions policies from coverage, exempted only private, undergraduate programs. *See* ANDREW FISHEL & JANICE POTTKER, NATIONAL POLITICS AND SEX DISCRIMINATION IN EDUCATION (1977).

36. Proposed Title IX Regulations, 39 Fed. Reg. 22,228-40 (1974).

37. *See id.* at 22,236.

38. Another important aspect of this interpretive exercise which helped furnish DHEW's "institutional" vision of Title IX coverage was the assertion that federal assistance directed to a specific program could be terminated if it was used to support a discriminatory program within the same institution. *See* 39 Fed. Reg. 22,228 (1974). This assertion of remedial authority would enable the agency to more effectively enforce the regulations by penalizing programs in direct receipt of federal assistance for discrimination occurring in programs theoretically benefitting from that assistance. Critics of this expansion of the agency's powers, however, asserted that it contravened the express intent of the statute's enforcement provision which provides:

> Compliance with any requirement adopted pursuant to this section may be effected by . . . the termination of or refusal to grant or continue assistance under such program

Notably, this modification of standards was not only grounded on the slimmest legal authority but involved a studious disregard of contradictory evidence and authority.[39] In support of its "benefit theory" of coverage, for example, DHEW relied exclusively on *Board of Public Instruction v. Finch,*[40] a case arising under Title VI in which the Fifth Circuit remarked

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> or activity to any recipient as to whom there has been an express finding on the record . . . but *such termination or refusal shall be limited to the particular political entity or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found. . . .*

20 U.S.C. § 1682 (1972) (emphasis added).

39. Apart from inconsistency with the express language of Title IX there are at least three additional contradictions of which DHEW was aware. First, prior to enactment Congress specifically rejected language advancing institutional coverage, choosing to more closely tailor the statute to the limits of its own power to condition appropriations. 117 CONG. REC. 30,155-58 (1971). Second, the "maintenance of effort" requirements routinely attached to federal categorical aid (which ensure that federal funds supplement rather than supplant state or local funds) essentially make it illegal for institutions to use those funds to support other programs. *See Comment, HEW's Regulation Under Title IX of the Educational Amendments of 1972: Ultra Vires Challenges* 1976 BYU L. REV. 133-87 (1976); Janet Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 71 (1976). And third, within the same ruling on which DHEW placed its sole reliance, *Board of Public Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969), the court went on to state that the agency could not affect compliance by threatening a termination of funds without demonstrating that the program in direct receipt of funds was itself discriminatory.

Equally compromising detail surrounded DHEW's decision to include federal student financial aid within the definition of "assistance," including the statement made prior to enactment by Title IX's Senate sponsor Birch Bayh that "[i]t is unquestionable in my judgement, that this would not be directed at specific assistance that was being received by individual students." 117 CONG. REC. 30,408 (1971). In the sole Title VI case authority cited by the agency in support of including student aid within the definition of assistance, *Bob Jones University v. Johnson*, 369 F. Supp. 597 (1974) *aff'd mem.*, No. 72-2164 (4th Cir. 1975), by contrast, the court made the specific determination that neither Title VI's language nor its legislative history revealed a congressional intent to exempt veterans' education benefits from coverage. *Id.* at 604.

Further undermining the agency's position on these issues was uncertainty over the automatic application of precedents established under Title VI with regard to race discrimination, to sex discrimination under Title IX. *See HEW's Regulation Under Title IX of the Educational Amendments of 1972: Ultra Vires Challenges.* 1976 BYU L. REV. 133, 167-69. Although numerous references were made concerning the parallel nature of the two statutes prior to enactment, constitutional law differentiates treatment of race and sex classifications. *See e.g.* 117 CONG. REC. 39,098-99 (1971). A court, according to this analysis, would be justified in giving broader meaning to "federal assistance" under Title VI in order to "interdict constitutionally impermissible racial discrimination" than it would under Title IX where many sex-based classifications are constitutionally permissible. 1976 BYU L. REV., 133, 167. The unqualified adoption of Title VI precedent, in other words, would have an unwarranted, expansive effect on Title IX doctrine.

40. 414 F.2d 1068 (5th Cir. 1969).

in dicta that virtually all programs within an institution benefit from federal assistance insofar as the introduction of federal monies "releases" institutional funds for other uses. Somehow eluding the agency's gaze, however, was the court's further statement that DHEW could not seek to affect compliance by terminating funds without first demonstrating that the program in direct receipt of those funds was itself discriminatory.[41] Absent the power to enforce compliance in "benefitting" programs, any extension of coverage to those programs would necessarily be meaningless.

Because it was premised on such fragile authority, when finally exposed to searching legal scrutiny, DHEW's "benefit theory" was eventually annulled by the Supreme Court in *North Haven Board of Education v. Bell*[42] and *Grove City College v. Bell,*[43] which returned Title IX coverage to the program-specific standard suggested in the statute. However, because the agency had exported its institutional standard of coverage to several other programs in the intervening decade, the Court's invalidation of that standard had broad implications. For this reason, activists from an array of civil rights organizations banded to persuade Congress to overrule *Grove City* with the adoption of the Civil Rights Restoration Act (CRRA). In each of the programs effected by *Grove City*, the CRRA amended the definition of "program or activity" to include institutions.[44]

B. Title IX Regulation of Athletics

1. *Administrative Action*

With the exception of the four-year period following *Grove City* (prior to enactment of the CRRA), "institutional" definitions of Title IX coverage have had profound consequences for athletic programs, which according to critics, are neither direct recipients of federal assistance nor "educational" within the

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41. *See id.* at 1074.

42. 456 U.S. 512 (1982).

43. 465 U.S. 555 (1984).

44. The Civil Rights Restoration Act broadened Title IX jurisdiction by redefining the term "program" to include: "all of the operations of . . . a college, university or other postsecondary institution, or a public system of higher education." Pub. L. No. 100-259 (1988) codified at 20 U.S.C. § 1687 (1988).

meaning of Title IX.[45] Guided by an institutional theory of coverage, however, DHEW naturally regarded extracurricular programs including athletics as falling within Title IX coverage and promulgated specific regulations to govern them.[46]

That action provoked a vigorous response in Congress. Amendments to Title IX[47] were introduced to exempt athletic programs either in whole or in part, for fear that a mandatory expansion of women's programs would divert resources from more visible and lucrative men's programs.[48] The sole approved measure, the Javits Amendment,[49] directed DHEW to make "reasonable provisions considering the nature of particular sports," a compromise attempt to exempt "revenue-producing" sports programs which unwittingly reinforced DHEW's basis for extending coverage to athletic programs in the first place. Congress, DHEW Secretary Caspar Weinberger reasoned, would not have imposed a "reasonableness" standard unless it considered athletic programs to be covered by the statute.[50]

Intercollegiate athletic programs, however, differ from other educational programs in ways that make them difficult targets of gender-based reform, including dangerous bodily contact in certain sports and an expectation of economic self-sufficiency at the departmental level.[51] For this reason perhaps, DHEW's proposed regulations sought to ensure equality of opportunity by simply equalizing participation; requiring institutions to undertake "affirmative efforts" in the form of additional training, support, and publicity to enable women to participate in greater numbers, and then to provide "athletic opportunities in

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45. *See* 20 U.S.C. § 1681(b) (1998).

46. *See* Proposed Title IX Regulations, 39 Fed. Reg. 22,228-40 (1974).

47. *See* 120 CONG. REC. S8488-89 (1974); S. Con. Res. 52, 94th Cong., 121 CONG. REC., S12695 (1975) (statement by Sen. Laxalt); H.R. Con. Res. 311, 94th Cong., 121 CONG. REC. H5636 (1975) (statement by Rep. Martin).

48. *See* 121 CONG. REC. 22,778 (1975).

49. The Javits amendment referred to in Pub. L. No. 93-380, § 844 (1974) is now codified at 20 U.S.C. § 1681 (1998).

50. *See* 20 U.S.C. § 1681(b) (1998).

51. The use of separate men's and women's teams (an otherwise impermissible gender classification under Title IX) to ensure that women are not "effectively" excluded from participation by differences in size, experience and ability, for example, involves the duplication of a host of fixed costs such as coaching salaries, facilities and maintenance, in addition to increases in such regular operating expenses as travel and accommodation. *See* Mark H. Rettig, Note, *Sex Discrimination and Intercollegiate Athletics*, 61 IOWA L. REV. 420, 452-54 (1975).

such sports and through such teams as will most effectively equalize opportunities for members of both sexes."[52]

While ease of administration certainly recommends that approach, requiring institutions to develop female interest in athletic participation also subtly shifts accountability from those factors within the control of institutions (i.e., number and quality of programs) to social factors largely beyond their control. From the 9700 comments, suggestions, and objections[53] elicited by these proposed requirements, accordingly, a decisive criticism emerged: by requiring institutions to increase female participation *prior* to any finding of discrimination by the institution, the requirements confused the concept of "equal opportunity" with that of "affirmative action."

Ultimately those criticisms and the clarity of the statute's injunction against the use of preferences to correct statistical imbalances[54] forced DHEW to not only withdraw the requirements, but to admit that they were inconsistent with the mandate.[55] The agency's final regulations consequently, seek to assess equal opportunity in athletic programming by reference to the accommodation of *existing* student interest, whether or not the results are statistically equivalent.[56]

Of equal or greater importance, however, is the fact that under these final requirements the accommodation of student interest is relegated to the status of one of a host of factors referenced by the agency. In assessing compliance, the regulations state that DHEW will consider:

> (a) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of the members of both sexes; (b) the provision of equipment and supplies; (c) scheduling of games and practice times; (d) travel and per diem expenses; (e) opportunity to receive coaching and academic tutoring; (f) assignment and compensation of coaches and tutors; (g) provision of locker rooms, practice and competitive facilities; (h) provision of medical and training

52. Proposed Title IX Regulations, 39 Fed. Reg. 22,228-40 (1974).
53. *See* 40 Fed. Reg. 24,128 (1975).
54. *See* 20 U.S.C. § 1681(b) (1998).
55. *See* 40 Fed. Reg. 24,134 (1975).
56. *See* 40 Fed. Reg. 24,127 (1975).

facilities and services; (i) provision of housing and dining facilities and services; and (j) publicity.[57]

An important consequence of assessing compliance by means other than exclusive reference to the accommodation of student interest is that institutions are able to retain greater control of programming decisions.[58]

Several years after Congress' reluctant approval of the final regulations,[59] the Department of Education's Office for Civil Right ("OCR") issued the Policy Interpretation of Title IX and Intercollegiate Athletics ("Policy Interpretation"), an interpretation of Title XI which the same Congress would almost certainly have disapproved because it renewed the idea of equalizing participation.[60]

In the document, OCR propels "effective accommodation of student interests and abilities" from a place of relative obscurity to the status of one of three major compliance areas. The relevance of this change is readily apparent: effective accommodation is elevated from at least a one-in-ten consideration under the regulations to a one-in-three consideration. Further, because the agency failed to clarify whether the tests must be applied together for the purposes of establishing compliance or may be applied independently, effective accommodation can be understood as a "complete compliance section on its own."[61] The two other compliance areas sharing this status are equita-

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57. 40 Fed. Reg. 24,134 (1975).

58. It is important to note in this regard that the regulations explicitly reject equal aggregate expenditures on men's and women's teams as the test of compliance and instead simply obligate institutions to provide the funds "necessary" to ensure that the opportunities provided are of similar quality. 40 Fed. Reg. 21,143 § 86.41(c) (1975).

59. Congress' "approval" actually took the form of the legislature's inability to pass a joint resolution disapproving of the regulations. The resolution was put forward by lawmakers who deemed DHEW's interpretation of Title IX, particularly its interpretation of coverage, to be so aggressive as to be "ultra vires," or beyond the rulemaking authority of the agency. *See* 20 U.S.C. § 1681(b) (1998); *see also* Janet Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 71 (1976).

60. *See* 44 Fed. Reg. 71,415 (1979). OCR assumed responsibility for Title IX following the dissolution of DHEW.

61. Susan M. Shook, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990s: Nonrevenue Men's Team Join Women Athletes in the Scramble for Survival*, 71 IND. L.J. 773, 797 (1996).

ble distribution of athletic scholarships[62] and "equivalence in other athletic benefits and opportunities" (e.g., travel and equipment).[63]

The Policy Interpretation allows institutions to demonstrate effective accommodation in three ways: (a) by showing that the rate of participation in athletic programs by members of the "under-represented sex" is substantially proportional to their rate of undergraduate enrollment, (b) by producing evidence of a history and "continuing practice" of program development for members of the under-represented sex, (c) or by producing evidence that the existing program "fully and effectively" accommodates the interests and abilities of both sexes.[64] In most instances, the Policy Interpretation indicates, meeting the effective accommodation requirement "will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels"—a result justified by "the discriminatory effects of the historic emphasis on men's intercollegiate sports" and the "nationally increasing levels of women's interests and abilities."[65]

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62. Under a separate provision, the regulations seek to assure that scholarship funds are awarded in proportion to the numbers of men and women participating in athletics programs: "To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in intercollegiate sports." 34 C.F.R. § 1906.37(c).

63. 44 Fed. Reg. 71,415-17 (1979).

64. *See* 44 Fed. Reg. 71,415-17 (1979).

65. *See* 44 Fed. Reg. 74,414-19 (1979). Another important aspect of this mechanism is the treatment of student interest assessments that the regulations left for institutions to "consider by a reasonable means [they] deem appropriate." 40 Fed. Reg. 24,135 (1975). In a statement reminiscent of the "affirmative effort" requirements under the proposed regulations, the Policy Interpretation provides:

> Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided: [they] take into account the nationally increasing levels of women's interests and abilities . . . do not disadvantage the members of an underrepresented sex . . . take into account team performance . . . [and] are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

44 Fed. Reg. 71,417 (1979).

2. *Judicial Construction of Title IX*

a. *Private Enforcement.* Another major development coming only four years after approval of the regulations involved a ruling of the Supreme Court which made institutions much more vulnerable to challenge. In *Cannon v. University of Chicago,*[66] the Court enabled individuals with complaints arising under Title IX to circumvent time-consuming administrative procedures by implying a private right of action. This move precipitated a flood of new litigation and essentially installed the courts as the primary enforcers of Title IX.

Utilizing a four-part analysis developed four years earlier in *Cort v. Ash,*[67] the Supreme Court determined that the purposes of Title IX, the legal context in which it was enacted, and the inadequacy of the statute's funding-termination remedy for redressing individual harm all suggested that Congress, despite of its silence on the issue, had contemplated enforcement of Title IX by private litigants. Justice Stevens, who authored the majority opinion, was particularly attentive to the fact that "in 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy."[68] "It is always appropriate," he reasoned in imputing an awareness of those developments to the Congress, "to assume that our elected representatives, like other citizens, know the law."[69]

Equally persuasive in the Court's view was the onerous burden of proof imposed on individuals to trigger the statutory remedy. "[I]t makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself . . . the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal

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66. 441 U.S. 677 (1979).

67. 422 U.S. 66 (1975).

68. Cannon v. University of Chicago, 441 U.S. at 697-98. Specifically, Justice Stevens cited *Bossier Parish School Board v. Lemon* 370 F.2d 847 (5th Cir. 1967), adding that the case had been "repeatedly cited with approval and never questioned during the ensuing five years." *Id.* at 698. Equally persuasive in Steven's view, was the fact that Title IX was "enacted against a backdrop of three recently issued implied-cause-of-action decisions of this Court involving civil rights statutes with language similar to that in Title IX." *Id.* at 698 n.22 (citing *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Allen v. State Bd. of Elections,* 393 U.S. 544 (1969); and *Jones v. Alfred H. Meyer Co.*, 392 U.S. 409 (1968)).

69. *Cannon,* 441 U.S. at 698.

funding is appropriate."[70] In such situations, the Court asserted, violations would be more efficiently remedied by a court ordered injunction, "requiring an institution to accept an applicant who had been improperly excluded."[71]

In his dissenting opinion, Justice Powell chastened the majority for succumbing to the "temptation to lend its assistance to the furtherance of [a] remedial end deemed attractive."[72] Justice Powell was particularly critical of the practice of implying private rights of action, something he viewed as a disturbing violation of the constitutional separation of powers because it allows the courts to essentially expand their own jurisdiction. "When Congress chooses not to provide a private civil remedy," he asserted, "federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction."[73] In this instance, he continued, Title IX's legislative history is clear that "Congress deemed the administrative enforcement mechanism it did create fully adequate to protect Title IX rights."[74]

Importantly, the installation of the federal courts as the arbiters of Title IX has tremendously accelerated the rate of policy development under the statute. A leading example is the

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70. *Id.* at 705.

71. *Id.*

72. *Id.* at 749.

73. *Id.* at 731-32. Only a single aspect of the Court's four-part analysis, Powell observed, dealt with legislative intent, which he viewed as the only legitimate basis for implying a right of action, while the other three he characterized as invitations to judicial lawmaking. Powell's treatment of the three remaining *Cort* factors was couched less in the facts of *Cannon* than in his objections to the entire practice of implying rights of action. On this basis, his dissent in *Cannon* has been recognized as the "doctrinal foundation for the Court's [subsequent] retreat from the liberal implication doctrine" and as the "judicial birth of the New Erie doctrine" (i.e., the judicial policy of non-interference with the decisions committed by the Constitution to the other branches of government). Donald L. Doernberg, *Juridical Chameleons in the 'New Erie' Canal*, 1990 UTAH L. REV. 759, 766; *see also* Mark D. Loftis, *Implied Rights of Action under Federal Statutes: The Continuing Influence of Justice Powell's Cannon Dissent*, 5 J.L. & POL'Y 349, 350 (1989).

Powell took particular exception to that aspect of the *Cort* analysis calling for a judicial determination of the consistency of a private right of action with the "underlying purposes" of the legislative scheme because it "permits a court to decide for itself what the goals of a scheme should be, and how those goals should be advanced." *Cannon*, 441 U.S. at 741. Even if such invasions of the legislative prerogative could be construed as constitutional, he asserted, they should nevertheless be avoided because they encourage Congress to "shirk its constitutional obligation and leave the issue to the courts to decide." *Cannon*, 441 U.S. at 743.

74. *Id.* at 730.

Court's decision in *Franklin v. Gwinnett County*,[75] which validated the use of compensatory damages to remedy individual harm arising from intentional violations of Title IX.[76]

Similarly, judicial cognizance of Title IX athletic regulations has rapidly evolved those requirements. The four cases regarded by proponents as the "jewels"[77] of Title IX athletic case law, for example, *(Cook v. Colgate University*,[78] *Cohen v. Brown University*,[79] *Favia v. Indiana University of Pennsylvania*,[80] and *Roberts v. Colorado State University*[81]) can all be traced directly to the Supreme Court's liberalization of Title IX enforcement .[82]

Interestingly, in all but one of those cases (*Cook*), the courts accorded considerable deference to OCR's Policy Interpretation and its unpublished *Investigator's Manual* (1990). These documents, however, clearly raised as many questions as they have answered. Does, for example, OCR's renewed emphasis on equalizing participation as opposed to simply prohibiting discrimination comport with the statute's goals? More specifically,

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75. 503 U.S. 60 (1992).

76. Following *Cannon*, courts struggled to resolve the Title IX grievances with which they were dealing in increasing numbers. After a period of uncertainty and reliance on injunctive remedies-which often led to the dismissal of lawsuits brought by students who had graduated by the time appeals were taken-that question was answered by the Supreme Court in *Franklin* (1992). Building on the private cause of action inferred in *Cannon* (and imputing a generally agreeable intent to Congress based on its actions following that decision), *Franklin* affirmed the power of the Federal courts to fashion any appropriate remedy, including monetary damages, to vindicate Title IX violations.

77. These cases initiated the judicial trend of accommodating demands that institutions add new women's teams of reinstate discontinued teams in order to increase the proportion of female athletes. *See* William E. Thro & Brian A. Snow, *Cohen v. Brown Univ. and the Future of Intercollegiate and Interscholastic Athletics*, 84 EDUC. L. REP. 611 (1993).

78. 802 F. Supp. 737 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993) (holding that the university's decision to eliminate its women's softball team violated Title IX and ordering the program reinstated).

79. The litigation generated four independent rulings: Cohen v. Brown Univ. *(Cohen I)*, 809 F. Supp. 978 (D.R.I. 1992), *aff'd (Cohen II)* 991 F.2d 888 (1st Cir. 1993), *aff'd on remand*, *(Cohen III)* 879 F. Supp. 185 (D.R.I. 1995), *aff'd (Cohen IV)* 101 F.3d 155 (1st Cir. 1996) and *cert. denied* 117 S. Ct. 1469 (1997).

80. 812 F. Supp. 578 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

81. 814 F. Supp. 1507 (D. Colo. 1993), *aff'd in part and rev'd in part*, 998 F.2d 824 (10th Cir., 1993), *cert. denied*, 510 U.S. 1004 (1983).

82. *See* Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the "Equal Opportunity" Standard*, 1994 DET. C.L. REV. 953, 963. The number of decisions issued in six cases commenced in 1992, for example, exceeded the number of decision involving athletics rendered during the first 19 years of Title IX's existence.

does a test in which compliance is assessed by reference to statistical proportionality or demonstrated progress towards that goal conform with Title IX's ban on preferential treatment or equal protection guarantees?[83] In each case, deferring to OCR's interpretive authority, the courts have answered those questions in the affirmative and clarified other issues of practical importance, including whether the effective accommodation analysis can be severed from the other major compliance areas (i.e.; distribution of scholarships and other material benefits of participation) for the purposes of determining compliance.[84]

b. *Cohen v. Brown University: Construing "Effective Accommodation."* Of the cases construing OCR's "effective accommodation" analysis, the most illustrative,[85] exhaustive,[86] and dispositive was *Cohen v. Brown University*,[87] the class-action suit brought by female members of Brown University's volleyball and gymnastics teams after those teams, along with two men's teams, were demoted for budgetary reasons from varsity to club status in May of 1991.

In the course of upholding OCR's effective accommodation analysis, the *Cohen* courts developed Title IX athletic policy by clarifying the three elements of the analysis, by deciding that "effective accommodation" itself is severable from the two other major areas of compliance for the purposes of establishing a violation of Title IX, and by unraveling an important challenge to the analysis. One striking aspect of these accomplishments

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83. *See* 20 U.S.C. § 1682 (1998).

84. *See* Heckman, *supra* note 82. Other issues clarified included how men's and women's programs should be compared and burdens of proof for each component of the three-pronged effective accommodation test.

85. *Cohen* is most illustrative of the limits of the analysis because Brown University had made significant strides following the enactment of Title IX to increase and improve its athletic program for women and, at the time, had an equal number of men's and women's teams, and female athletic participation in excess of 38% — considerably greater than that of most other institutions. *See* Thomas S. Evans, *Title IX and Intercollegiate Athletics: Primer on Current Legal Issues*, 5 KAN. J.L. & PUB. POL'Y, 55-64 (1996).

86. *Cohen*, to reiterate, involved two trials at the district court level, one on a preliminary injunction and another "on the merits," two appeals, and a petition for review by the Supreme Court.

87. The litigation generated four independent rulings: Cohen v. Brown Univ. *(Cohen I)*, 809 F. Supp. 978 (D.R.I. 1992), *aff'd* *(Cohen II)* 991 F.2d 888 (1st Cir. 1993), *aff'd on remand*, *(Cohen III)* 879 F. Supp. 185 (D.R.I. 1995), *aff'd* *(Cohen IV)* 101 F.3d 155 (1st Cir. 1996) and *cert. denied* 117 S. Ct. 1469 (1997).

was the level of deference accorded to OCR's interpretation of the statute and regulations. In rejecting Brown's contention that the Policy Interpretation "goes so far afield that it countervails the enabling legislation," the appellate court found the OCR document to be a "plausible" interpretation of the regulation.[88] The trial court noted moreover, that when the Civil Rights Restoration Act (1987) was enacted, Congress had the opportunity to disapprove of the Policy Interpretation and "chose instead to reaffirm its intent that Title IX's prohibition against sex discrimination be broadly construed."[89]

The question of severability, or whether a failing in any one of the Policy Interpretation's three major areas of compliance may constitute a Title IX violation, as the district court noted, was a decisive consideration because the claim against Brown University was based solely on an alleged violation of the effective accommodation component.[90] To avoid such a ruling, the University argued that the Policy Interpretation and the Investigator's Manual contain a "complex framework for assessing athletic programs as a whole" and that many more questions and factors would have to be addressed before establishing a Title IX violation.[91]

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88. The court stated in pertinent part:

> Whether Brown's concept [of the effective accommodation analysis] might be thought more attractive, or whether we, if writing on a pristine page, would craft the regulation in a manner different than the agency, are not very important considerations. Because the agency's rendition stands upon a plausible, if not inevitable, reading of Title IX, we are obligated to enforce the regulation according to its tenor.

Cohen v. Brown Univ. (*Cohen II*), 991 F.2d 888, 899 (1993). The court drew its authority for this ruling from *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), a case in which the Supreme Court stated that a "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold [it]." *Id.* at 843. Elsewhere the court noted: "Although [OCR] is not a party to this appeal, we must accord its interpretation of Title IX appreciable deference. The degree of deference is particularly high in the Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX." *Id.* at 895. Ironically, the court traced the source of OCR's "explicit delegation" to none other than the 1974 Javits Amendment to Title IX which was enacted to secure special treatment in the regulations for revenue-producing sports *in the event* that athletics might be covered by the pending regulations. *See supra*, note 49.

89. 879 F. Supp. 185, 198 (D.R.I. 1995).

90. *See* Cohen v. Brown Univ. (*Cohen I*), 809 F. Supp. 978 (D.R.I. 1992).

91. *Id.* at 987. The Investigator's Manual states: "[t]here is no rule or number of disparities that when reached constitutes a violation. Generally, the determination is whether, in reviewing the program as a whole the disparities add up to a denial of equal opportunity to athletes of one sex."

The court of appeals found both documents inconclusive and pointed to conflicting language in the Investigator's Manual, providing that investigations may be limited to less than all three of the major compliance areas. The court ruled that because participation controls access to all other benefits provided by athletic programs, the effective accommodation analysis could be severed from an overall determination of compliance.

> Equal opportunity to participate lies at the core of Title IX's purpose. Because the [effective accommodation analysis] delineates this heartland, we agree that the district courts that have so ruled and hold that, with regard to the effective accommodation of students' interests and abilities, an institution can violate Title IX even if it meets the "financial assistance" and "athletic equivalence" standards. In other words, an institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects.[92]

Having concluded that effective accommodation was "the point of departure for evaluating compliance," the courts went on to apply the Policy Interpretation's three-pronged analysis to the facts presented,[93] summarily noting that a thirteen point disparity between the percentage of women athletes and the percentage of women undergraduates at Brown failed to satisfy the first test of "substantial proportionality."[94] As a matter of law, the appellate court noted *(Cohen II)*, "proportionality" furnishes a 'safe harbor' from Title IX liability, and institutions not wishing to engage in extensive compliance analysis "may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup."[95]

The second and third prongs of the effective accommodation analysis, "[a] history and practice of continuing program expan-

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92. *Cohen II*, 991 F.2d at 897.

93. 44 Fed. Reg. 71,415-17 (1979).

94. *Cohen I*, 809 F. Supp. at 991. The district court noted after remand that because satisfaction of the substantial proportionality test effectively terminates the entire analysis, as a practical matter, the standard must be stringent enough to effectuate the purposes of Title IX: "[t]hus, substantial proportionality is properly found only where the institution's intercollegiate athletic program mirrors the student enrollment as closely as possible." Cohen v. Brown Univ. (*Cohen III*), 879 F. Supp. 185, 202 (D.R.I. 1995).

95. *Cohen II*, 991 F.2d at 897-98.

sion" and "full and effective accommodation," according to the *Cohen II* appellate court, reflect "that there are circumstances under which, as a practical matter, something short of . . . proportionality is a satisfactory proxy for gender balance."[96] In applying the second prong, however, the district court found that although Brown University had significantly increased opportunities for female athletes in the 1970's immediately after Title IX was enacted, a ten-year hiatus failed to demonstrate a *continuing* practice of program expansion.[97]

The third prong, the appellate court remarked in its first review of the case, "sets a high standard."[98] "[I]t demands not merely some accommodation, but 'full and effective accommodation.' If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test."[99] In applying this final prong on remand (*Cohen III*), the district court found that the University's demotion of two women's teams in which "there is great interest and talent" was indicative of something less than full and effective accommodation. Subsequently, the court concluded that Brown was in violation of Title IX, and ordered the University to submit a comprehensive plan for achieving compliance.[100]

Brown appealed the Court's conclusion on both legal and empirical grounds.[101] The most important of its legal arguments involved the charge that the third prong of the analysis requires an institution to accommodate every expression of student interest "to the fullest extent until the substantial propor-

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96. *Id.* at 898.
97. *See Cohen I,* 809 F. Supp. at 991.
98. *Cohen II,* 991 F.2d at 898.
99. *Id.*
100. *See Cohen III,* 879 F. Supp. at 211-12.
101. In seeking review by the Supreme Court, for example, the University contested its condemnation under the third-prong of "full and effective accommodation" by producing evidence tending to show that Brown women were less interested in athletic participation than men. Over a four-year period, specifically Brown's survey of its applicants for admission revealed that women were far less interested in participating in competitive sports than men. The University also produced evidence that women's participation in college varsity sports nationally exceeds their participation in other college sports programs, such as club and intramural sports, and fell far short of the levels of participation by men in those activities. Appellant's Petition for Certiorari, 1996. This is the crux of the ongoing debate–whether colleges and universities should be accountable for culturally inspired differences in interest.

tionality of prong one is achieved," thus imposing "preferential or disparate treatment to members of one sex on account of [a statistical] imbalance" in contravention of both Title IX (§1681[b]) and the Equal Protection Clause.[102]

The courts' response to this argument was most fully developed in the University's second appeal in 1996 (*Cohen IV*). There the First Circuit court stated emphatically that this "is not an affirmative action case."[103] With regard to the specific charge that the effective accommodation analysis mandates the use of gender-based preferences and quotas, the court ruled that because the analysis provides two ways to demonstrate compliance that are unrelated to proportionality, the analysis violates neither Title IX's own prohibition on preferential treatment nor equal protection guarantees. "The question of substantial proportionality under the Policy Interpretation's three-part test," the court asserted, "is merely the starting point for analysis, rather than the conclusion; a rebuttable presumption rather than an inflexible requirement."[104]

On this occasion, however, the University was not alone in its belief that the different elements of the effective accommodation analysis should be taken together, rather than viewed in isolation for the purposes of analysis under Title IX's ban on the use of preferences (§1681[b]) or equal protection doctrine, because a determination of noncompliance necessarily involves all three tests. In his dissenting opinion, for example, the chief judge of the First Circuit stated, "[i]n my view it is the result of the test, and not the number of steps involved, that should determine if a quota system exists."[105] While agreeing that "no aspect of the Title IX regime at issue . . . mandates gender-based preferences or quotas," Judge Torruella nevertheless argued that taken together the three prongs comprise "an affirmative action, quota-based scheme."[106]

> The majority claims that 'neither the Policy Interpretation nor the district court's interpretation of it mandates statistical balancing.' The logic of this position escapes me. . . . The first prong . . . surely requires statistical balancing. . . . The second

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102. Cohen v. Brown Univ. (*Cohen IV*), 101 F.3d 155, 174-75 (1st Cir. 1996).
103. *Id.* at 169.
104. *Id.* at 171.
105. *Id.* at 196.
106. *Id.*

> prong . . . is essentially a test that requires the school to show that it is moving in the direction of satisfying the first prong. Establishing that a school is moving inexorably closer to satisfying a requirement that demands statistical balancing can only be done by demonstrating an improvement in the statistical balance. . . . Finally, the third prong . . . goes farther than the straightforward quota test of prong one . . . the unmet interests of the underrepresented sex must be completely accommodated before any of the interest of the overrepresented gender can be accommodated.[107]

Notably, in *Pederson v. Louisiana State University*[108] a Louisiana district court gave effect to Judge Torruella's remarks when, on the belief that the interpretation of the effective accommodation analysis in *Cohen* and *Roberts* advanced the use of prohibited preferences and quotas, the court refused to follow those decisions. In their acceptance of proportionality as an appropriate test of Title IX compliance, the court reasoned:

> [those cases] strongly rely on each other and on a stated administrative deference. . . . However, the jurisprudential emphasis on numerical "proportionality" is not found within the statute or the regulations; rather, it is inferred from language in the Policy Interpretation and ignores other language within the Policy Interpretation and the statute which argues against such an inference.[109]

Finding that statistical tests of compliance run counter to the statutory objective acknowledged by the Supreme Court (in both *Cannon* and *Franklin*) of protecting individuals, rather than groups, from gender-based discrimination, and that preferential treatment based on such tests is explicitly prohibited, the *Pederson* court concluded that the deference accorded by the courts *Cohen* and *Roberts* to OCR's Policy Interpretation was misplaced.[110]

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107. *Id.*

108. 912 F. Supp 892 (M.D. La. 1996).

109. *Id.* at 914.

110. *See id.* at 913. The Court further stated:

> To accept the interpretation in *Roberts*, *Cohen* and *Horner*, and the argument made by defendants [LSU], one must assume that interest and ability to participate in sports is equal as between all men and women on all campuses. For instance, if a university has 50% female students and 50% male students, the assumption, under this argument must follow that the same percentage of its male population as its female population has the ability to participate and the interest or desire to participate in sports at the same

V. DISCUSSION

As Brown University discovered, Title IX athletic regulation now, more than ever, is an animal with teeth. Without any other prerequisite, an aggrieved student-athlete may initiate and maintain a lawsuit on the basis of an institutions' failure to achieve or maintain statistical proportionality; compensatory damages may be awarded to redress individual harm,; and court orders may be issued to expand offerings for women athletes, coercing a redistribution of resources within athletic departments.

Whatever view one takes of this regulatory machinery and its relationship to Title IX, there is no evidence of an organized effort to deliver colleges and universities into the hands of federal bureaucrats, no furtive plot to deprive them of their autonomy or academic freedom. Having said that, the parallels between the existing requirements and the broader but non-explicit purposes of Title IX do lend themselves to a depiction of the agencies and courts struggling to cast- off the statute's express and implied limitations to achieve a different vision of gender-equality, particularly in the area of intercollegiate athletics. The emphasis on statistical proportionality, in particular, can be viewed as a reflection of the belief, widely held among social reformers, that interest and ability follow opportunity.

Based on the foregoing analysis it may be argued that the development Title IX policy generally, and Title IX athletic policy specifically, has paralleled two distinct disagreements or policy conflicts first encountered in the course of the statutue's formation. These policy conflicts can be loosely defined as "total versus qualified equality" and "equality versus autonomy."

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competitive level. A review of *Roberts*, *Cohen* and *Horner* finds no evidence to prove or disprove this assumption. . . .

Without some basis for such a pivotal assumption, this Court is loathe to join others in creating the "safe harbor" or dispositive assumption for which defendants and plaintiffs argue. Rather, it seems much more logical that interest in participation and levels of ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time. To assume, and thereby mandate, an unsupported and static determination of interest and ability as the cornerstone of the analysis can lead to unjust results.

Id at 913-14.

A. *Total Equality vs Qualified Equality*

The struggle over the level of protection to be accorded sex discrimination was first evident in the attempt by women's groups to replicate federal policy regarding race discrimination through constitutional litigation, advancement of the ERA and in the initial stages of the legislative effort which led to the creation of Title IX itself. In each of those endeavors, proponents advanced a "no exceptions" policy premised on the belief that sex, like race, is an immutable characteristic and therefore, an inequitable basis for differential treatment.

But while Congress gave its reluctant approval to the ERA whose ratification by a majority of the states seemed distant and unlikely, it rejected the much more immediate prospect of regulating sex discrimination through a simple extension of Title VI of the Civil Rights Act (1964). In so doing legislators Congress tacitly rejected the use of race policy as a benchmark for Title IX protection, choosing instead to honor the distinctions between race and sex discrimination in constitutional law, and diverting Title IX from the path of "total equality" onto a path of "qualified equality."

The second instance of this conflict involved the struggle, prior to enactment, over the exemption of undergraduate admissions policies from Title IX coverage which proponents understood to be the lynchpin of Title IX protection inasmuch as the number of men and women admitted to college would have a direct bearing on the level of accommodation necessitated elsewhere. Based on the rejection of the amendment to Title VI of the Civil Rights Act, however, arguments advanced by higher education leaders and their congressional allies bore the assumption that Title IX was a "qualified" statement of nondiscrimination policy, contemplated to accommodate the autonomy and academic judgement of colleges and universities. Legislators validated that assumption, in part, by agreeing to exempt the admissions policies of the more insular and tradition-bound private institutions.

A third instance involved the attempts between 1973 and 1975 to exempt revenue-producing sports from Title IX coverage, a move thought to be justified by the redistributive potential of the statute and regulations. While acknowledging the qualified nature of Title IX protection by adopting an amend-

ment which insinuates a desire for special treatment, however, on this occasion Congress declined the invitation to further qualify that protection on the basis of conflicting economic priorities.

The final example of conflict over the total versus qualified nature of Title IX protection involved the question of causation visible in the shifting standards of accountability for differences in male and female interest in athletic participation. The earliest indication of tension in this area involved the inclusion within Title IX of a provision (§ 1681[b]) prohibiting the use of preferences to correct "statistical imbalances." There can be little doubt that this provision was intended included to abate the fear that Title IX would be used to create a new class of "entitlements," or an obligation on the part of institutions to redress the effects of societal forces on female participation in higher education.[111]

Notwithstanding that express limitation, the issue immediately surfaced in the first draft of DHEW's athletic regulations which proposed the imposition of "affirmative efforts" to cultivate and then accommodate female interest in participation. Following a torrent of negative feedback and faced with the prospect of congressional review, however, the agency recanted and in its final regulations limited its concern to existing student interest

Clarifying the regulations five years later (1979), OCR returned to the more aggressive approach, specifying that compliance with the effective accommodation component of the regulations would be assessed by reference to the proportionality of male and female participation in athletic programs to their respective rates of undergraduate enrollment and, failing that inquiry, demonstrations of either a history of program expansion or "full and effective" accommodation of female interest in participation.[112]

The difference between ensuring equal opportunity and remedying the effects of societal discrimination under this "three-pronged" analysis, however, is not an intuitive one. Nevertheless, in the *Cohen* series of cases the courts expended a great deal of energy attempting to make that distinction in

111. *See* 117 CONG. REC. 5,813 (1972).
112. *See* 44 Fed. Reg. 71,415-17 (1979).

order to avoid condemnation of the effective accommodation analysis under the statutory ban on preferences and statistical balancing. By holding that a failure of the first prong (proportionality) alone is sufficient to establish a presumption of noncompliance, moreover, the courts have succeeded in further shifting responsibility for societal influences on women's interest in sports to colleges and universities.[113] That result is clearly more congruent with a doctrine of "total equality" than with the qualified form of equality actually enacted.

B. *Equality vs. Autonomy*

Many of the competing demands put forward during Title IX implementation stemmed from the right perceived by institutions to self-determination. Depending upon the context, this alleged prerogative was alternatively advanced as an essential element of the loosely acknowledged doctrine of institutional academic freedom, and as a logical and necessary extension of Congress' longstanding but informal policy of not interfering in college and university affairs.

The specification of Title IX of jurisdiction provides the earliest illustration of the conflict between the claims to self-determination and the statute's broader purpose of eliminating sex discrimination in education. In that instance, lawmakers rejected a Senate version of Title IX which would have extended coverage to institutional recipients of federal assistance, preferring to limit coverage to those individual programs and activities within institutions in direct receipt of funds.[114] To reinforce this limitation, a provision was inserted stating that the termi-

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113. The amicus brief filed by sixty colleges and universities supports this conclusion:

> Contrary to the wording of Title IX which does no more than prohibit discrimination "on the basis of sex," the [analysis] virtually eliminates the requirement of causation, i.e. that the reason for the disparity be sex discrimination . . . the only defenses are that a college or university has a history and continuing practice of program expansion for female athletes or that female athletes have been fully accommodated in the athletic program. These "defenses," however, are in effect nothing more than a recognition that Title IX compliance will take time. . . . The polestar of a violation remains the fact of a statistical disparity, regardless of cause. Under this definition of discrimination, the issue is not whether the abilities and/or interests of male and female athletes are equally accommodated but whether each group gets its quota of the available varsity positions as measured by their percentage in the student body.

Brief of Sixty Colleges and Universities as Amici Curiae in Support of Petition, 1996.

114. *See* 20 U.S.C. § 1681 (1998).

nation of federal assistance shall be "limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found."[115] This passage meant that only those programs in direct receipt of federal assistance could be penalized for noncompliance.

The second expression of this conflict involved Congress' exemption of the admissions policies of private institutions from the operation of Title IX. In that debate, conservative lawmakers asserted that the imposition of Title IX would erode the academic freedom of colleges and universities to set their own educational policy by dictating the "appropriate" ratio of men and women on campus.[116] Illustrating the divergence of opinion on this issue, Title IX proponents responded that disguising gender bias as a component academic freedom not only failed to make it legitimate, but disparaged women and nullified the concepts of social responsibility, taxpayer equity, and civil rights.[117]

A third example involved DHEW's interpretation of Title IX jurisdiction. A broad interpretation of coverage would vastly expand the agency's ability to combat discrimination. To accomplish that goal, DHEW sharply departed from a literal interpretation of the statute. An examination of the legal reasoning employed to justify the expansion of coverage to "institutional" recipients of federal assistance imparts a definite sense of an agency attempting to "break out of the constraints" of an enacted compromise to strike a new balance between institutional interests in self-determination and its own the desire to eradicate sex discrimination.[118]

When the issue was revisited in *Grove City*, the Supreme Court took a decidedly more formalistic approach, according greater weight to the legislative choice of language and history than to the desire for more effective regulation. With political support for more effective regulation mounting, however, Congress ultimately intervened to realign the political balance between equality and autonomy[119] to make institutional liability a

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115. 20 U.S.C. § 1682 (1998).

116. 117 CONG. REC. 39,249 (1971).

117. *See id.*

118. *See* Clune, *supra* note 13.

119. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 codified as 20 U.S.C. §§ 1681-1685 (1998).

permanent feature of Title IX and other anti-discrimination programs.

Finally, there are the decisions in *Cannon* and *Franklin* where the Supreme Court liberally imputed intent to Congress to enhance Title IX enforcement by enabling individuals to enforce the statute by means of private lawsuits. Formerly, the statute's administrative enforcement mechanism combined with DHEW's inability to discharge its responsibilities[120] had operated as an effective safeguard of institutional autonomy. Following *Cannon* and *Franklin*, however, the political balance of the Title IX program tipped in favor of equality, rather than autonomy, as individuals with the assistance of the courts, were installed as the became the principal enforcers of Title IX—a result arguably at odds with the will of the legislature.

VI. CONCLUSION

Although the foregoing analysis was not meant to establish a discreet, causal connection between the policy conflicts encountered in the formation of Title IX and form or direction of the ensuing policy development, it does offer some general reinforcement of several of the assertions put forward in Clune's political model of implementation.

One of those assertions is that legal objectives of a given implementation change when "[t]he priorities represented by the law enter a world with many other priorities."[121] In the context of Title IX regulation of college sports, nothing could be clearer. From a highly confined expression of nondiscrimination policy, for example, jurisdictional standards were stretched to include athletics which, economically speaking, are quite remote from the benefits of federal assistance. Further, rather than seeking to simply ensure nondiscrimination at the institutional level, by encouraging institutions to equalize participa-

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120. For a number of years prior to *Cannon*, OCR had never terminated assistance for a Title IX violation, and would issue a letter of compliance if institutions simply executed an "assurance" that they would come into compliance sometime in the future (an informal policy aired in the agency's proposed Policy Interpretation but removed from the final version). *See* Ellen Vargas, *Franklin v.Gwinnett County Public Schools and its Impact on Title IX Enforcement*, 19 J.C. & U.L. 373, 381 (1993).

121. William Clune & M. Van Pelt, *A Political Method of Evaluation: The Education for All Handicapped Children Act of 1975 and the Several Gaps of Gap Analysis*, 48 J.L. & CONTEMP. PROBS. 7, 39 (1985).

tion the bureaucratic interpretation of Title IX upheld in *Cohen* is arguably more concerned with ameliorating societal attitudes about female participation in sports .

How these changes came about is the question of greatest interest—and the one of greatest difficulty. An additional ambition of this Article, notwithstanding, has been to examine several of the model's higher-order assertions: 1) that implementation is a "recursive" process in which changes in legal standards typically revolve around policy conflicts first encountered during the formation of the mandate; 2) that the legal process of implementation makes discretion more accessible to special interests which may actually set decision making processes in motion; and 3) that the legal decision making occurring in implementation is infused with public policy discourse (either explicit or implied).

As to the claim of recursiveness, the preceding discussion illustrated that two very basic conflicts have had a durable effect on the development of Title IX policy: total versus qualified equality and equality versus autonomy. The debate over equalizing participation consummated in *Cohen* for example, provides an illustration of the struggle over the identity of Title IX first witnessed in the formative effort to emulate race policy—whether, that is, the program would attempt to remedy sex discrimination and its effects or be limited to eradicating discriminatory policies and practices within schools, colleges, and universities.

Whether the history and analysis of Title IX implementation produced have shown that special interests held sway over legal outcomes is another matter of interpretation, but an intuitively more difficult one because much of the development which occurred emanated from a single source: DHEW and its successor, OCR. In the majority of instances these agencies, rather than Congress or the courts, were the facilitators of change, as in the extension of Title IX coverage to indirect beneficiaries of federal assistance and the invention of regulations and guidelines giving the program a more pronounced remedial focus.[122]

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122. It is indicative of the agency's disposition towards the nondiscrimination purposes of Title IX, rather than the statute's recognition of competing institutional interests, that even when changing policy was not specifically within its control, it actively supported the expansion of those goals; as in *Cannon* where the agency

Although the agencies crowded the field, there are concrete examples of special interests using the different elements of government to respond to one another's actions in ways which precipitated changes in standards. Perhaps the most volatile of those interactions involved the definition of Title IX coverage. DHEW's sympathetic interpretation of the statute's jurisdictional limitations prompted efforts in Congress to renounce the agency's regulations as well as the initiation of lawsuits which ultimately implicated the Supreme Court and further action by Congress. A different but equally responsive pattern is visible in the later stages of implementation where OCR and the courts engaged in a "give-give" relationship, supporting one another's efforts to make substantial proportionality the measure of compliance.

Finally, the "deconstruction" of several important developments conducted in this Article makes it supremely obvious that the legal decision-making which has occurred in the course of Title IX implementation has been infused with public policy discourse, the third of Clune's assertions. From a legal perspective, DHEW's decision-making (which was almost uniformly more consistent with a desire for the most comprehensive and remedial provisions than with the limitations delineated in the mandate) can only be described as unconventional: in the sense that its actions and explanations gravitated toward the most aggressive and least supportive positions, and in the sense that its sympathy for the underlying purposes of the statute was almost candid.

Although judicial decisions are more difficult to characterize because of the complexity of legal reasoning, it is possible to spot activism, even when it emanates from a body as legally accomplished as the Supreme Court. The Court's willingness to impute knowledge and decisions to Congress in the course of implying both a right of action and a damages remedy, for example, impart an unmistakable sense of result-oriented jurisprudence. Yet, from a public policy standpoint, those decisions make excellent sense.

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supplied the Court with its opinion that an implied right of action would neither conflict with Title IX's statutory enforcement mechanism nor interfere with its own efforts to effectuate the goals of the statute.

Many of the decisions examined in this Article, in fact, were plainly result-oriented, with legalistic detail provided more as an assertion of how the law might be developed to support a desired outcome than to demonstrate how the contemplated outcome actually squared with the mandate, legislative history, or the regulations. The reasoning employed by the different courts in *Cohen* to uphold OCR's effective accommodation analysis, and to sever the analysis from the other aspects of the regulation, is illustrative. There the courts summarily deferred to OCR's interpretative authority and then fiercely endeavored to distinguish the effective accommodation analysis in such a way that it could be rescued from Title IX's ban on preferences and statistical balancing.

A few things seem clear from a simple reading of Title IX: it prohibits sex discrimination in those programs over which Congress has direct control (owing to the receipt of federal assistance); it is a qualified ban on sex discrimination (as it includes important exemptions and limitations); the use of preferences to correct statistical imbalances is forbidden; and enforcement is to be affected by administrative agencies primarily through the termination of funds. If these very literal translations of the statute can be characterized as the expectations shared at the outset of the program, this study has shown that these expectations, depending on one's perspective, have either been exceeded or ignored.

Much of the potential for the invasion of institutional prerogatives feared by institutions in the policy formation process, correspondingly, has been realized. Currently, colleges and universities face much greater exposure to Title IX regulation than presaged by the compromises reached during the statute's formation on the issues of coverage, enforcement, and remedial obligations.

By today's standards, however, many of Title IX's limitations seem anachronistic, and for many years frustrated the groundswell of political support for women's rights. As the result of two decades of continuous interaction, on the other hand, the current regulatory framework, which *Cohen* helped to solidify, is perhaps a more accurate reflection of societal norms regarding women's rights and the responsibility of social institutions to effect social change.